July 14, 2006

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Majority Leader
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The Hon. Harry Reid
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The Hon. Nancy Pelosi
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The Hon. F. James Sensenbrenner, Jr.
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Dear Members of Congress:

We are a group of constitutional law scholars and former government officials, writing in our individual capacities. Earlier this year we wrote you two letters (dated January 9 and February 2, 2006) explaining why, in our view, the recently disclosed National Security Agency (NSA) electronic surveillance program is unlawful under the Foreign Intelligence Surveillance Act of 1978 (FISA), and why the Department of Justice (DOJ)'s legal defense of that surveillance program is unpersuasive.[1]

We will not repeat our previous arguments here. We write now merely to explain how the Supreme Court's recent decision concerning military commissions, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), further refutes the only two legal arguments that the DOJ has offered in support of the NSA program—(i) that the September 18, 2001 Authorization to Use Military Force (AUMF) authorizes the NSA program; and (ii) that if FISA prohibits the NSA program, it unconstitutionally restricts the President's powers under Article II of the U.S. Constitution.

In a letter to Senator Charles Schumer dated July 10, 2006, the DOJ asserts that the Court's decision in *Hamdan* "does not affect our analysis of the Terrorist Surveillance Program." Letter to the Honorable Charles Schumer from William E. Moschella, Assistant Attorney General, U.S. Department of Justice ("DOJ July 10th Letter") at 1. In our view, not only does *Hamdan* "affect" the analysis, it significantly weakens the Administration's legal footing. The Court in *Hamdan* addressed arguments regarding the military commissions that are very similar (in some respects identical) to the DOJ's arguments regarding NSA spying, and the Court's reasoning strongly supports the conclusion that the President's NSA surveillance program is illegal.[2]

1. The Court in *Hamdan* held that the military commissions the President established in 2001 transgressed two statutory restrictions that Congress had enacted.

First, the Court held that because Article 36 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 836, prescribes that the rules applied in courts-martial, provost courts, and military commissions must be "uniform insofar as practicable," the rules applicable to courts-martial apply to military commissions absent a showing that

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[1] Those letters, together with the DOJ memoranda to which we were responding, are collected in a recent issue of the Indiana Law Journal. *See* 81 Ind. L.J. 1355 (2006), *republished at* http://www.acslaw.org/files/Microsoft%20Word%20-%2012_NSA_Debate.pdf.

[2] Other observers who had previously defended the NSA program's legality have candidly acknowledged that *Hamdan* calls the NSA program into serious question. *See, e.g.*, Cass Sunstein, *The NSA and Hamdan*, http://balkin.blogspot.com/2006/07/nsa-and-hamdan.html ("after *Hamdan*, the NSA surveillance program, while still not entirely indefensible, seems to be on very shaky ground, and it would not be easy to argue on its behalf in light of the analysis in *Hamdan*"); Andrew C. McCarthy, *Dead Man Walking*, http://article.nationalreview.com/?q=YTljNWU3ZTRmYTY5YzNlOTUyM2M2Yjc4OTZkMmY2MTI= ("*Hamdan* is a disaster because it sounds the death knell for the National Security Agency's Terrorist Surveillance Program.").

such rules would be impracticable for use by such commissions—a showing the Administration had failed to make. 126 S. Ct. at 2790-2793; *see also id.* at 2804-2808 (Kennedy, J., concurring).

Second, the Court held that Article 21 of the UCMJ, 10 U.S.C. § 821, requires that such military commissions comply with the international laws of war, including treaty obligations imposed by the Geneva Conventions. 126 S. Ct. at 2774, 2786; *see also id.* at 2799 (Kennedy, J., concurring). The court found that the Administration's commissions violated Common Article 3 of the Geneva Conventions, which requires, among other things, that detainees in an armed conflict such as our conflict with Al Qaeda be tried for violations of the laws of war only by "a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *Id.* at 2795-2797 (majority opinion). The Court held that the Administration's commissions were not "regularly constituted" because their procedures deviated from the statutorily authorized courts-martial system in ways that had not been justified by any practical need. *Id.* at 2796-2797; *see also id.* at 2802-2804 (Kennedy, J., concurring).

In sum, the Court held that the commissions established by the President "exceed[] the bounds Congress has placed on the President's authority" in two statutory provisions of the UCMJ. *Id.* at 2808 (Kennedy, J., concurring).

2. More importantly for present purposes, the Court also *rejected* two arguments for why the President might be able to circumvent such statutory limits. Those two arguments parallel the ones the DOJ has offered in defense of the President's decision to authorize the NSA to ignore FISA's limitations.

First, the Administration argued in *Hamdan* that when Congress enacted the September 18, 2001 AUMF against Al Qaeda, it implicitly authorized the President to implement his military commissions, notwithstanding any limits that might have been found in preexisting statutes such as the UCMJ. The Court summarily rejected this argument: "[W]hile we assume that the AUMF activated the President's war powers, and that those powers include the authority to convene military commissions in appropriate circumstances, there is nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth in Article 21 of the UCMJ." 126 S. Ct. at 2775 (citations omitted). The Court also cited *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 105 (1869), for the proposition that "'[r]epeals by implication are not favored.'" *Id.* And it explained in a footnote that even where (unlike here) Congress has not only enacted a force authorization but also *declared war*, such steps in and of themselves do not authorize the President to do what pre-existing statutes forbid. *Id.* at 2775 n.24 (citing *Ex parte Quirin*, 317 U.S. 1, 26-29 (1942)).

Second, the Court went out of its way to address whether the President has authority under Article II to contravene statutes that restrict his ability to engage and defeat the enemy in times of war, even though the Solicitor General had not pressed that

argument directly.[3] The Court explained that even assuming the President has "independent power, absent congressional authorization, to convene military commissions," nevertheless "he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers." *Id.* at 2774 n.23 (citing the "lowest ebb" passage of Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

Justice Kennedy elaborated on the Article II question in his separate concurrence, invoking Justice Jackson's three-tiered categorization of presidential power in *Youngstown*. Justice Kennedy explained that *Hamdan* was a case on the lowest tier of presidential power, because the President had acted "in a field with a history of congressional participation and regulation," where the UCMJ had established "an intricate system of military justice," with authorizations and restrictions alike, and where, in the Court's view, the President had acted in violation of certain of those pre-established restrictions. 126 S. Ct. at 2800-2801 (Kennedy, J., concurring, joined by Souter, Ginsburg and Breyer, JJ.).

3. The Court's analysis in *Hamdan* confirms that the two arguments that the DOJ has advanced in its support of the NSA surveillance program are flawed.

a. *The AUMF Argument.*

As with the military commissions in *Hamdan*, so too, here, there is "nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth [in FISA]." 126 S. Ct. at 2775. The AUMF does not even mention either surveillance or FISA, let alone purport to eliminate FISA's conditions and restrictions. And nothing in the legislative history of the AUMF suggests any intent by Congress to override FISA or to impliedly repeal any of its provisions.

In fact, the Administration's AUMF argument is considerably weaker in the NSA context than in *Hamdan*. The statutory limits on military commissions that the Court identified in the UCMJ and in Common Article 3 were ambiguous and subject to reasonable dispute. *See id.* at 2840-2849 (Thomas, J., dissenting). By contrast, FISA's limitations on electronic surveillance are crystal clear, and uncontroverted: FISA expressly declares that FISA itself, together with certain provisions of title 18 of the U.S. Code, prescribe the "exclusive means" of engaging in electronic surveillance, 18 U.S.C.

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[3] In the court of appeals, the DOJ *had* argued that interpreting the UCMJ "to reflect congressional intent to limit the President's authority" would "create[] a serious constitutional question." Brief for Appellants at 56-57, *Hamdan v. Rumsfeld*, No. 04-5393 (D.C. Cir., filed Dec. 8, 2004). In the Supreme Court, the Solicitor General also invoked the President's Article II powers as a basis for a narrow construction of the UCMJ, arguing that "'the detention and trial of petitioners—ordered by the President in the declared exercise of the President's powers as Commander in Chief of the Army in time of war and of grave public danger—are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress.'" Brief for Respondents at 23, *Hamdan v. Rumsfeld*, No. 05-184 (U.S., filed Feb. 23, 2006) (quoting *Quirin*, 317 U.S. at 25).

§ 2511(2)(f), and makes it a crime to conduct electronic surveillance "except as authorized by statute," 50 U.S.C. § 1809(a)(1). FISA even includes a specific wartime surveillance provision, *id.* § 1811, which authorizes surveillance outside the FISA framework for only 15 days after a declaration of war. If the AUMF cannot be read to authorize conduct contrary to the statutory limitations *implicit* in the UCMJ, then surely there is no warrant for finding that Congress intended the AUMF to authorize a deviation from the specific, express, and carefully crafted limitations that FISA imposes.

The DOJ's July 10th Letter makes two arguments in an attempt to distinguish *Hamdan*'s holding with respect to the AUMF. Neither is persuasive.

i. The DOJ first notes that the criminal-sanctions provision of FISA, 50 U.S.C. § 1809(a)(1), imposes criminal penalties for electronic surveillance undertaken "except as authorized by statute"—while there is no analogous "except as authorized by statute" clause in the UCMJ provisions at issue in *Hamdan*. DOJ July 10th Letter at 1-2. The DOJ argues, in effect, that even if the AUMF does not *supersede* FISA, it *satisfied a condition* in FISA, namely, the "authorized by statute" clause of 1809(a)(1).

There are several problems with this argument. First, just as there is "nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth in [the UCMJ]," *Hamdan*, 126 S. Ct. at 2775, likewise nothing in the AUMF's text or legislative history provides any reason to conclude that Congress intended that enactment to satisfy the "except as authorized by statute" condition of the FISA criminal provision. "'Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.'" *Gonzales v. Oregon*, 126 S. Ct. 904, 921 (2006) (quoting *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001)).[4]

Second, FISA itself specifies that a declaration of war—which invariably includes an authorization to use military force, *see* 81 Ind. L.J. at 1416—authorizes only 15 days of warrantless surveillance. To read the AUMF to authorize *unlimited* warrantless surveillance during the conflict with Al Qaeda would contradict Congress's clear intent to require an explicit statutory amendment to depart any further from FISA's rules during wartime.

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[4] Moreover, the Congressional Research Service concluded that the legislative history of FISA "appears to reflect an intention that the phrase 'authorized by statute' was a reference to chapter 119 of Title 18 of the U.S. Code (Title III) and to FISA itself, rather than having a broader meaning." Congressional Research Service, *Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information*" at 40 (Jan. 5, 2006). Similarly, in recent Senate testimony, David Kris, the Associate Deputy Attorney General in charge of national security earlier in the Bush Administration, explained that "[t]aking FISA as a whole, the penalty provision's reference to a surveillance 'authorized by statute' is best read to incorporate another statute only if it is listed in the exclusivity provision [18 U.S.C. § 2511(2)(f)] (or . . . if it effects an implicit repeal or amendment of that provision." Testimony of David S. Kris before the Committee on the Judiciary, United States Senate at 5 (Mar. 28, 2006), http://balkin.blogspot.com/kris.testimony.pdf.

Finally, for the NSA spying program to be lawful, the AUMF would also have to be read to have implicitly repealed another provision of FISA, providing that it and specified provisions in Title 18 are the "exclusive means" of lawful electronic surveillance. 18 U.S.C. § 2511(2)(f). But the Court in *Hamdan* indicated that such an implied repeal is "'not favored.'" 126 S. Ct. at 2775 (quoting *Ex parte Yerger*, 75 U.S. (8 Wall.) at 105).

ii. The DOJ's second statutory argument is that whereas the UCMJ "expressly deals with the Armed Forces and with armed conflict and wars," Congress "by contrast" allegedly "left open the question of what rules should apply to electronic surveillance during wartime." DOJ July 10th Letter at 2.

But even if the existence of an express wartime provision were relevant to the statutory argument, FISA *does* deal expressly with electronic surveillance during wartime, in its limited 15-day authorization of warrantless surveillance after a declaration of war. 50 U.S.C. § 1811. FISA specifically contemplates that the President cannot authorize electronic surveillance without a court order and outside the FISA framework *during wartime*—and nothing in the AUMF even purports to affect FISA's limits on wartime electronic surveillance.[5]

b. *The Article II Argument.*

The Court's analysis in *Hamdan* also undermines the DOJ's argument that FISA impermissibly interferes with the President's Article II authority as Commander in Chief. As the Court made clear, the President is obligated to comply with statutory restrictions, even during wartime, as long as those restrictions constitute a "proper exercise" of Congress's own powers. 126 S. Ct. at 2774 n.23; *see also id.* at 2799 (Kennedy, J., concurring) (the President must comply with laws that are "duly enacted" by Congress "in the proper exercise of its powers"). The DOJ has offered no plausible basis for concluding that FISA is any less "proper" an exercise of Congress's powers than were the UCMJ provisions at issue in *Hamdan*.

i. The DOJ first questions whether Congress even had the constitutional authority to enact FISA. It contends that whereas the UCMJ was enacted pursuant to Congress's express Article I authorities, "[t]here is no similarly clear expression in the Constitution of congressional power to regulate the President's authority to collect foreign intelligence necessary to protect the Nation." DOJ July 10th Letter at 2. This argument borders on the frivolous. A bipartisan majority in Congress enacted FISA, with presidential input and approval. The statute has been in place for almost thirty years, during which time Republican and Democratic administrations alike have operated under its modest

[5] The DOJ repeats its argument that the AUMF should be construed as *supplying* the additional authority contemplated in § 1811 "for the armed conflict with al Qaeda." DOJ July 10th Letter at 2. But as we have previously explained, 81 Ind. L.J. at 1416, if that were the case, then every declaration of war would itself indefinitely *extend* the 15-day window for the duration of the conflict, since each such declaration necessarily (and historically) includes a force authorization. Such a reading would render § 1811 superfluous.

limitations and conditions, with no suggestion that FISA is not appropriate Article I legislation.

FISA was enacted pursuant to at least three Article I powers. Like the statutes that restricted the President's war powers in the leading cases of *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), and *Youngstown*, and like countless other current federal statutes involving wire and electronic communications systems, FISA is valid Commerce Clause legislation, Art. I., § 8, cl. 3, because it regulates and protects wire communications transmitted between states and between nations. *See* 50 U.S.C. § 1501(l) (defining "wire communication" to mean "any communication while it is being carried by a wire, cable, or other like connection furnished or operated by any person engaged as a common carrier in providing or operating such facilities *for the transmission of interstate or foreign communications*"). FISA is also properly viewed as a statute "necessary and proper for carrying into execution . . . powers vested by this Constitution in the Government of the United States, or in . . . any officer thereof." Art. I, § 8, cl. 18. Just as the Necessary and Proper Clause empowered Congress to create the NSA in the first instance, *cf. M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), it authorizes Congress to set the terms under which that agency shall operate. Finally, as the NSA is part of the Department of Defense, FISA's application to that agency is also an exercise Congress's power "[t]o make Rules for the Government and Regulation of the land and naval Forces." Art. I., § 8, cl. 14.

ii. The DOJ also argues that the President's authority to collect foreign intelligence is "a direct corollary of his authority, recognized in *Hamdan*, to direct military campaigns." DOJ July 10th Letter at 2. But that does not *distinguish* this case from *Hamdan*, because *Hamdan* likewise concerned an Executive war powers function—the trial of enemy combatants for violations of the laws of war—that "'by universal agreement and practice'" is an "'important incident of war.'" *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion) (quoting *Quirin*, 317 U.S. at 28).[6] The Court found no constitutional concern with construing a congressional statute to limit the President in his trial of enemy combatants. So, too, there is no constitutional impediment to Congress restricting the President's ability to conduct electronic surveillance within the United States and targeted at United States persons.

Hamdan thus refutes the DOJ's argument that "serious constitutional questions" are raised whenever Congress enacts statutes that "interfere . . . at all" with what the Administration calls "a core exercise of Commander in Chief control over the Armed Forces during armed conflict"—in particular, "the Commander-in-Chief's control of the means and methods of engaging the enemy in conflict." 81 Ind. L.J. at 1404 n.15. Not a single Justice in *Hamdan* offered the slightest indication that the UCMJ, as construed by the Court, would violate Article II—even though the statutory restrictions in *Hamdan*

[6] Indeed, the Solicitor General argued to the Supreme Court in *Hamdan* that the power to try the enemy for war crimes is "part of the prosecution of the war," in "'furtherance of the hostilities directed to a dilution of enemy power.'" Brief for Respondents at 21 (quoting *Hirota v. MacArthur*, 338 U.S. 197, 208 (1949) (Douglas, J., concurring)).

dealt solely with the President's treatment of alleged unlawful enemy combatants, and (unlike FISA) not with the conduct of non-enemy U.S. persons inside the United States.[7]

iii. Finally, the DOJ argues that it would be "considerably easier" to show that FISA, as opposed to the UCMJ, prevents the President from performing a constitutional *duty*, namely, to defend the Nation. DOJ July 10th Letter at 3 (citing the general separation-of-powers principle articulated in *Morrison v. Olson*, 487 U.S. 654, 691 (1988)). But the President also has a duty to take care that Congress's laws are faithfully executed. And the duty to defend the Nation does not give the President a blank check to ignore congressional statutes or the Constitution. *See Hamdan*, 126 S. Ct. at 2799 (Breyer, J., concurring); *see also id.* at 2798 (majority opinion) ("the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction"). Moreover, nothing in FISA makes defense of the Nation impossible—and the President was perfectly free to seek an amendment to it if he deemed change necessary.

In sum, in authorizing the NSA to engage in warrantless surveillance, the President is acting—just as he did in authorizing the military commissions—"in a field with a history of congressional participation and regulation," where the political branches had established "an intricate system" of laws containing authorizations and restrictions alike. *Id.* at 2800-2801 (Kennedy, J., concurring). As Justice Kennedy explained in *Hamdan* (*id.* at 2799), even in a time of armed conflict it is important under our constitutional scheme that the Executive should adhere to such "standards deliberated upon and chosen in advance of crisis, under a system where the single power of the Executive is checked by other constitutional mechanisms":

> Where a statute provides the conditions for the exercise of governmental power, its requirements are the result of a *deliberative and reflective process engaging both of the political branches*. Respect for laws derived from the customary operation of the Executive and Legislative Branches gives some assurance of stability in time of crisis. *The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment.* (Emphasis added.)

[7] The DOJ suggests (DOJ July 10th Letter at 3) that the *Hamdan* Court's discussion of the Article II argument is not binding because, as Justice Stevens noted, the government "d[id] not argue" that the President "may disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers." 126 S. Ct. at 2774 n.23. As noted above, however, *supra* note 3, the Government did invoke the President's Article II powers as a reason why the Court should construe the UCMJ to authorize the tribunals. In any event, even if the Court was not required to resolve whether the President's Article II powers allowed him to override statutory dictates in *Hamdan*, it is fair to assume the Court would not have gone to such lengths to construe the statutes as it did, and to determine that the President had exceeded their limitations, if it had serious doubts about whether Congress could constitutionally limit the President here—and that the dissenting Justices would have raised any constitutional doubts they might have had as a further basis for construing the statutes to uphold the commissions.

We hope that you find these views useful as you address the President's authorization of the NSA electronic surveillance program.

Sincerely,

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